United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ Affidavit of mailing

75-1233

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1233

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID HERNDON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant David Herndon appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*) entered on June 6, 1975, convicting him, following his plea of guilty, of an aborted bank robbery in violation of 18 U.S.C. § 2113(a). Previously, a jury could not agree that appellant had "attempted" to rob the bank (see Appellant's App. C; Indictment 74 Cr. 697). The instant plea was entered on the second count of a superseding indictment (Appellant's App. B; 75 Cr. 192), which charged appellant with the "intent" to rob the bank in violation of the second paragraph § 2113(a).[1] Chief Judge Mishler sentenced appel-

[1] § 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in

[Footnote continued on following page]

lant to a term of five years imprisonment. Appellant is currently incarcerated.

On this appeal appellant claims that Chief Judge Mishler improperly relied upon his belief that appellant had lied at the trial for attempted bank robbery when he denied drawing a fake gun and that Chief Judge Mishler assumed appellant's guilt of that "attempt" rather than the version of the crime to which appellant had pleaded guilty. Appellant, though conceding that he fully intended to rob the bank when he entered it, denied going so far as to draw the fake gun. Appellant also contends that the presentence report contained numerous mistakes which influenced Chief Judge Mishler's thinking. He maintains that the presentence report erroneously stated that appellant admitted to a cocaine habit, and to an attempt to commit the bank robbery, as opposed to simply intending the robbery, and erroneously represented that his brother-in-law had a criminal record, that his mother had led a promiscuous life, that he had but one employment and that his apartment was furnished only with the bare necessities.

In brief, we believe that the transcript of sentencing demonstrates that Judge Mishler recognized, and did not premise the sentence upon, the purported factual errors in the presentence report and that as a trial judge pos-

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the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

sessing a wealth of competence and experience, it was his duty and function to assess the appellant's credibility, as well as the testimony of the bank guard who had testified at the trial that appellant had, in fact, drawn a gun which was later found to be a toy.

Statement of the Case

A. Preceding trial ending in a mistrial.

On October 28, 1974, after purchasing a toy pistol, appellant entered the Greater New York Savings Bank, 55 Flatbush Avenue, Brooklyn, New York, at about 1:45 P.M. According to appellant's version of what occurred, he entered the bank intending to rob it and then, without ever having displayed the gun or threatened anyone in the bank, he changed his mind and fled (A. 9-14).[2] In contrast, the guard in the bank, Jean Elie, testified at trial that appellant feigned illness, asked for two cups of water, drank them, lit a cigarette and then took a gun out of his pocket and said, "This is a stick up. Give me all the money or I'll blow your head off" (A. 2). The guard further testified that after informing Herndon that he had summoned an ambulance, Herndon ran out of the bank and after a twenty minute chase was apprehended with the aid of two patrolmen (A. 3-5).

At the trial, the jury did not agree on a verdict and a mistrial was declared on January 24, 1975.[3] There-

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[2] References preceded by "A" refer to pages of the Government's Appendix.

[3] In a similarly worded statement appearing twice in the appellant's brief (pp. 5, n, and 10), appellant seeks to create the impression that the prosecution agreed with defense counsel's gratuitous statement at the sentencing that the jury had hung eleven to one for acquittal. Without commenting on either the relevancy or accuracy of that information, we simply note that the Assistant at the sentencing did not accept defense counsel's figures (A. 38-39).

after, a superseding indictment was returned on March 13, 1975 consisting of two counts: Count 1—attempted bank robbery and Count 2—entering a bank with intent to commit a larceny, 18 U.S.C. § 2113(a). Appellant pleaded guilty to Count 2 on March 24, 1975. Count 1 was dismissed on motion of the Assistant United States Attorney. On June 6, 1975, Chief Judge Mishler sentenced appellant to five years imprisonment.

B. The sentencing proceedings

Counsel for appellant stated at the sentencing proceeding that "the [presentence] report is totally inaccurate" (A. 20-21). ". . . it presents a picture of this man that in no way resembles Mr. Herndon." Specifically, appellant's counsel challenged that appellant admitted an attempted robbery.[4] The probation officer claimed, "That was the statement that was made to me" (A. 21-22). Herndon thereupon denied that he made the statement. The court at this point recalled: "He testified at the trial under oath, he admitted to intent and nothing else. He was very careful about that" (A. 23).

The colloquy illustrates the basic factual issue in the case—whether appellant pulled out the gun he had purchased just before entering the bank, pointed it at the

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[4] The disputed paragraph in the presentence report reads as follows:

> *Defendant's Statement.* The defendant admits his guilt claiming that his reasons for committing the attempted robbery were based upon the depression he was feeling after having taken a financial loss of approximately $200 on a dance he had sponsored for the preceding weekend. While claiming that the crime was impulsively committed, the defendant admitted that he was under the influence of cocaine when entering the bank. His description of the entire offense was identical with those details supplied by the government except for the statement made by the bank guard that the defendant displayed a gun. The defendant continued to deny such.

guard with a threat and demand for money, as guard Jean Elie testified at trial, or whether he never displayed the gun and simply abandoned his original intent to rob the bank. It is, however, perfectly clear from the record that Chief Judge Mishler recalled that appellant's testimony under oath was confined to intent to rob rather than attempted robbery (A. 23).

It is equally clear, as well, that although Chief Judge Mishler did not credit appellant's trial testimony, he did not add additional time to the sentence because of his belief that appellant may have committed perjury in addition to attempting to rob the bank. Thus, at the sentencing, in recalling a case (*United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974)) in which the sentence was increased because defendant lied on the stand, Chief Judge Mishler, who was also the sentencing Judge in *Hendrix*, unequivocally stated: "I am not going to do that here. I am just going to sentence him on the crime that he committed" (A. 42).[5]

Secondly, counsel objected to the characterization of appellant's home environment as promiscuous premised on his mother's relationship with a number of men. To this, Judge Mishler responded that he did not "care about how many lovers she had" (A. 24). He remarked that knowledge of the kind of household in which appellant was reared would aid him in understanding appellant's "present situation," and "I might have given him a lighter sentence because of it" (A. 25). The court made no moral judgment concerning the life style of the mother, and in fact, expressed a sympathetic understanding of appellant's objection to this portion of the report.

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[5] We note, that if counsel for the appellant at trial perceived, as counsel on appeal has argued that Chief Judge Mishler was running afoul of the *Hendrix* case, she kept silent and voiced no objection.

Thirdly, counsel for appellant stated that appellant's brother-in-law did not have a criminal record as entered in the report. The probation officer acknowledged the possibility of an inaccuracy in this statement (A. 26).

Fourthly, counsel objected to the description of appellant's apartment as containing "just bare necessities," and explained that appellant, who had moved in 3 or 4 weeks previously, did not have the money to furnish or decorate his new living quarters (A. 26-27).

Fifthly, the probation officer reported that appellant admitted to a narcotic parole officer that he had weekly contact with cocaine at a cost of about $35.00 a week. Appellant denied that he had contact with cocaine but then commented that he had used cocaine every week prior to his arrest (A. 29-30). Moreover, appellant expressly declined Chief Judge Mishler's offer to "bring . . . in" the parole officer who appeared to have the closest knowledge of appellant's current drug habits (A. 30-31).[6]

Finally, appellant's counsel contested the statement that appellant had only one employment when in fact, she stated, he had two in recent years (A. 33).

The above "errors", defense counsel argued, revealed the bias and improper "attitude" of the pre-sentence report (App. B., p. 8). It should be noted, however, that neither at the sentencing proceeding nor in the appellate brief does counsel challenge the presentence report's accuracy as to a major, substantive area of the report—the prior criminal record of Herndon. The record from 1968-1974 fills close to three pages. In addition, following two of his arrests, Herndon was certified as a drug addict and committed to the State Narcotic Addiction Control Commission program.

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[6] On appeal, appellant has suggested the necessity of a hearing to "determine the accuracy" of the presentence report (Brief, p. 17, n.). In view of trial counsel's stance at the sentencing, and appellant's desire to have the matter over with, we think the suggestion is precluded.

ARGUMENT

The sentencing procedures were in all respects proper.

A. The sentence was not predicated on the alleged errors in the presentence report.

Apart from the frivolous dispute as to whether or not Herndon admitted to the probation officer that he attempted to rob the bank, none of the putative errors in the pre-sentence report affects the extensive history of criminal offenses which preceded the instant charge.[7] It is a chronicle of eleven criminal charges within the space of six years against a background of drug addiction. Accordingly, this is not a case involving a sentence based upon misrepresented or unsubstantiated prior criminal conduct, *Townsend* v. *Burke*, 334 U.S. 736, 740-41 (1948); *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States* v. *Needles*, 472 F.2d 652, 658-59 (2d Cir. 1972); *United States* v. *Weston*, 448 F.2d 627 (9th Cir. 1971); *McGee* v. *United States*, 462 F.2d 243, 245 (2d Cir. 1972),or upon constitutional invalidity of prior convictions, *United States* v. *Tucker*, 404 U.S. 443, 445 (1972) or upon the appellate court's finding "that the judge was confused, if not altogether mistaken," about defendant's prior criminal record, *United States* v. *Malcolm*, *supra*, 432 F.2d at 816. Appellant has not demon-

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[7] We note that the dispute as to whether appellant changed his version of the crucial events and admitted to Mr. Sachs of the probation office that he had "attempted" to rob the bank seems utterly contrived. As can be seen, the thin-line legal distinction between an "attempt" to rob a bank and entering a bank with intent to rob it escaped Sachs (as well as those who framed the penalty provision for § 2113(a)). This is obviously so because appellant had still maintained, to Sachs, that he did not draw the gun. Thus, the important feature of appellant's versions of the events was faithfully recorded by Sachs in the probation report (see footnote 4, *supra*, at 4).

strated misrepresentation, confusion or constitutional infirmity in the record of prior criminal conduct. Moreover, he has not demonstrated reliance by Chief Judge Mishler on the supposed errors in the presentence report.

Appellant's counsel misstates the law in asserting that "It is clearly established that a sentence based on erroneous information must be set aside" (Appellant's Brief at 10). It is where "misinformation of constitutional magnitude" infects the determination of a sentence, where the foundation of the sentence is "extensively and materially false," that defendant can credibly raise the issue of a denial of due process. *United States* v. *Tucker*, *supra*, 404 U.S. at 447; *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *United States* v. *Malcolm*, *supra*, 432 F.2d at 815.

Neither any one of, nor the sum of, the alleged errors in the presentence report rises to the requisite constitutional level of a denial of due process. In fact, the errors are *de minimis*. The court recognized some—an omission in the employment record, the misidentification of a brother-in-law—and gave no indication of reliance on these controverted statements.

Instead, the sentence imposed by Chief Judge Mishler was founded on Herndon's criminal conduct. As to that, the presentence report was hardly the sole or primary source of information on which the court would be compelled to rely. If other factors—the home environment in which appellant was reared, the dependence of the family on society for financial support, appellant's continued use of drugs over an extended period of time despite attempts to treat him—cast a discouraging shadow over appellant's future and his capability for self or assisted rehabilitation, these are the realities of which a sentencing judge should be informed "to acquire a thorough acquaintance with the character and history of the man before it."

United States v. *Doyle*, 348 F.2d 715, 721 (2d Cir. 1965), *cert. denied*, 382 U.S. 843 (1965).

Unfavorable as well as favorable data are relevant to the determination of a sentence. *Id.*, *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir. 1968). Appellant cannot successfully challenge a sentence because *in his opinion* the probation report was biased and contained uncomplimentary statements. *United States* v. *Needles*, 472 F.2d 652, 654 (2d Cir. 1973). As expressed by Justice Black in *Williams* v. *New York*, 337 U.S. 241, 245 (1949), the sentencing judge should "consider information about the convicted person's past life, health, habits, conduct and mental and moral perpensities. The sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to examine."[*] Chief Judge Mishler did no less and no more in the instant case.

B. The district judge acted well within the broad discretionary limits afforded the District Court in sentencing, by considering the testimony from the trial.

The liminal principle which governs the consideration of this appeal is that a "sentencing judge has very broad discretion in imposing any sentence within the statutory limits . . ." *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972); *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *United States* v. *Tucker*, *supra*, 404 U.S. at 446; *McGee* v. *United States*, *supra*, 462 F.2d at 245. A sen-

[*] In his article, "The Sentencing Process and Judicial Inscrutability," 49 St. John's L. Rev. 215 (1975), Chief Judge Irving R. Kaufman stresses that a sentencing judge should draw upon a broad spectrum of information and elaborate the reasons for his decision. That is precisely what Chief Judge Mishler did here.

tence of five years is well within the statutory maximum (twenty years) provided by 18 U.S.C. § 2113(a).

This is not a case in which the defendant was denied access to the presentence report and the sentencing judge failed to exercise discretion on a case-by-case basis, *United States* v. *Brown*, 470 F.2d 285, 288 (2d Cir. 1972); 479 F.2d 1170 (2d Cir. 1973), tailoring the sentence to the particular defendant and his specific background, record and problems.

By contrast, Chief Judge Mishler, presiding at appellant's trial on the single count indictment for attempted bank robbery had a much more extensive opportunity to observe and evaluate appellant than could have been afforded simply at a sentencing hearing following a guilty plea. Indeed, defense counsel acknowledge that the court was "aware of all of the facts" (A. 38) and that the court knew more about appellant than the probation officer (A. 36). As this court has itself stated, ". . . the judge's use and appraisal of a vivid trial circumstance, after adversary testing, is scarcely to be deemed less reliable" than other data involved in the sentencing process. *United States* v. *Hendrix*, *supra*, 505 F.2d at 1235.

Against this background, Chief Judge Mishler concluded that appellant's "calculated" testimony emphasizing solely an *intent* to commit larceny when robbing the bank, and denying that he pulled out a gun and threatened an *armed robbery* as the bank guard testified was not to be credited as against the other, non-biased testimony in the case.[9]

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[9] In addition to the bank guard's direct testimony that appellant had drawn the gun, there was additional evidence showing that bystanders also may have seen the gun when, following appellant's flight, they shouted that he had a gun and had "robbed the bank" (A. 6).

In *Hendrix*, *supra*, 505 F.2d at 1235, this Court affirmed a sentence in which Chief Judge Mishler "added about two years for perjury during the trial . . .". This Court held that "perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it." *Id.* at 1236. Of course, in the instant case, Judge Mishler decided not to augment the sentence because of Herndon's perjury (A. 42).[10]

We do not understand how the principle expressed in *Hendrix* comes into play here. It has been held that a district judge may consider crimes of which a defendant has been acquitted, *United States* v. *Sweig*, *supra*, 454 F.2d at 184, as well as charges which have previously been dismissed, *United States* v. *Doyle*, *supra*, 348 F.2d at 721. In this case, the attempted bank robbery charge was dismissed, but was never even the subject of an acquittal. We do not perceive, therefore, that the *Hendrix* decision puts appellant in a more favorable position than the appellants in either *Sweig* or *Doyle*.

In this case, it was necessary for Chief Judge Mishler to determine, in his own mind, whether appellant had drawn the gun. Having heard all the testimony on that issue, he determined that the gun had, in fact, been drawn, and though that conclusion necessarily carries with it the judge's disbelief of appellant's testimony, it should hardly be an occasion to invoke the *Hendrix* decision. Simply put, in *Hendrix* the sentence was increased solely

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[10] Even had he determined to increase the term to reflect defendant's perjury, he would have complied with the *Hendrix* rule. The repeated and consistent remarks of the judge during the sentencing proceeding that he did not believe Herndon's testimony demonstrate that he was persuaded beyond a reasonable doubt that Herndon did not speak the truth. "I made my own appraisal of him when he testified. I think he was a constant liar" (A. 39).

by reason of the defendant's perjury. In this case, Chief Judge Mishler, charged with the need to reconstruct the events in the bank, chose to accept the bank guard's corroborated testimony over the testimony of appellant. Such a choice hardly falls within the ambit of *Hendrix*.

There was no abuse of discretion, but sentence based upon a careful consideration of relevant factors. Appellant's assertion that the judge predicated his sentence solely on errors in the presentence report and on appellant's perjury is warrantless.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: August 29, 1975

Respectfully submitted,

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PAUL B. BERGMAN,
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JOSEPHINE Y. KING, ESQ.,
(On the Brief).[11]

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[11] The United States Attorney's office wishes to acknowledge the assistance of Professor Josephine Y. King in the preparation of this brief. Professor King is currently on leave from her post at the Hofstra University Law School and is expected to join this office in September as an Assistant United States Attorney.

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26 Court Street - Room 701
Brooklyn, N.Y. 11242

Evelyn Cohen

orn to before me this
rd day of September, 1975

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